(3)

No. 90-996

In the Supreme Court of the United States

OCTOBER TERM, 1990

COLORADO INTERSTATE GAS COMPANY, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals properly upheld the order of the Federal Energy Regulatory Commission requiring petitioner to eliminate a fixed cost "minimum commodity bill" in its rates for the sale of natural gas.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 904 F.2d 1456. The order of the Federal Energy Regulatory Commission requiring petitioner to eliminate its minimum commodity bill (Pet. App. 29a-62a) is reported at 41 F.E.R.C. ¶ 61,179. The order of the Federal Energy Regulatory Commission denying rehearing (Pet. App. 63a-82a) is reported at 43 F.E.R.C. ¶ 61,089.

JURISDICTION

The judgment of the court of appeals was entered on May 31, 1990. A petition for rehearing was denied on August 23, 1990. Pet. App. 27a-28a. On

November 9, 1990, Justice White extended the time within which to file a petition for a writ of certiorari to and including December 21, 1990. The petition for a writ of certiorari was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under Sections 4 and 5 of the Natural Gas Act, 15 U.S.C. 717c and 717d, the Federal Energy Regulatory Commission regulates the rates that natural gas pipelines charge for selling and transporting natural gas in interstate commerce. Pipelines typically charge—and the Commission reviews—rates consisting of two basic components: a "demand charge" and a "commodity charge." The pipeline-supplier imposes a "demand charge" on all customers who have contracted to receive specified amounts of gas. The supplier assesses this fixed sum charge in proportion to the maximum quantity of gas the customer is entitled to demand under the contract; the customer must pay this charge even if he actually demands no gas. The demand charge thus enables the supplier to recoup some portion of its fixed costs in providing facilities of sufficient capacity to meet customers' peak-load entitlement. The supplier levies a "commodity charge" on each unit of gas actually sold to customers. This charge enables the supplier to recover its variable costs as well as those fixed costs not recovered through the demand charge. See generally Pet. App. 3a n.3.

For many years, when customers' demand met or exceeded the supply of natural gas, some pipeline-suppliers included in their rate schedules a specific type of commodity charge known as a "minimum commodity bill." Such minimum bill provisions es-

sentially established minimum commodity charges, requiring customers to pay for certain quantities of gas even if they did not take delivery of gas during the relevant time period. The Commission initially approved of such guarantees for several reasons. First, the Commission believed that, without recourse to minimum commodity bills, pipelines might not otherwise be able to recover much of the costs incurred in constructing facilities on behalf of customers with multiple supply options. Second, the Commission surmised that, absent such guarantees, pipelines might not be able to keep those customers from leaving the pipeline system, thus exposing the remaining "captive" customers to increased costs. Finally, the Commission thought that minimum bills might be needed to reduce pipelines' exposure to "take-or-pay" liabilities in contracts with gas producers. See generally *Atlantic Seaboard Corp.*, 38 F.P.C. 91 (1967), aff'd, *Atlantic Seaboard Corp. v. FPC*, 404 F.2d 1268 (D.C. Cir. 1968).

In recent years, however, as natural gas supplies exceeded demand, the Commission reexamined its treatment of minimum bills on an industry-wide basis. The Commission took that step having recognized that such "practices frustrated the move toward a competitive wellhead market initiated by Congress in the NGPA [Natural Gas Policy Act of 1978, 15 U.S.C. 3301 *et seq.*], since purchasers could not obtain access to cheaper sources of supply than those provided by the pipelines, for example, by purchasing directly from the producer." Order No. 500-H, *Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, FERC Stats. & Regs., Regs. Preambles ¶ 30,867, at 31,510 (1989). In Order No. 380, issued in 1984, the Commission therefore required pipelines to eliminate their variable

costs from all minimum bills. *Elimination of Variable Costs From Certain Natural Gas Pipeline Minimum Commodity Bill Provisions*, [1982-1985] FERC Stats. & Regs., Regs. Preambles ¶ 30,571 (1984).[1] That order, however, left the validity of fixed cost minimum bills "to be resolved in individual pipeline proceedings." *Transwestern Pipeline Co.* v. *FERC*, 820 F.2d 733, 735 (5th Cir. 1987), cert. denied, 484 U.S. 1005 (1988); see Order No. 380, *supra*, at 30,973-30,974.

2. a. In March 1985, petitioner Colorado Interstate Gas Company (CIG), a natural gas pipeline regulated by the Commission, filed for a general rate increase. CIG proposed to retain the fixed cost minimum commodity bill in its tariff governing sales of natural gas to respondent Natural Gas Pipeline Company of America (Natural), another FERC-regulated pipeline.[2] That minimum bill required Natural "to pay the commodity costs associated with ninety percent of its annual entitlement, even if it takes delivery of no gas from CIG." Pet. App. 3a. As the court of appeals pointed out, "CIG recovers

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[1] See also Order No. 380-A, [1982-1985] FERC Stats. & Regs., Regs. Preambles ¶ 30,584 (1984); Order No. 380-C, [1982-1985] FERC Stats. & Regs., Regs. Preambles ¶ 30,607 (1984); Order No. 380-D, 29 F.E.R.C. ¶ 61,332 (1984).

The D.C. Circuit later upheld the validity of the Commission's series of rulemaking orders concerning the elimination of recovering variable costs through minimum bills See *Wisconsin Gas Co.* v. *FERC*, 770 F.2d 1144 (1985), cert. denied, 476 U.S. 1114 (1986).

[2] On the day the Commission issued Order No. 380, it also issued an order expressly directing CIG to eliminate variable costs from the pipeline's minimum commodity bills. *Colorado Interstate Gas Co.*, 27 F.E.R.C. ¶ 61,315 (1984), aff'd, 791 F.2d 803 (10th Cir. 1986), cert. denied, 479 U.S. 1043 (1987).

from [Natural] approximately $15 million annually in production and gathering costs via the minimum bill." *Ibid.*

The Commission suspended the effectiveness of CIG's proposed rate increase until September 28, 1985, and directed an administrative law judge to conduct an evidentiary hearing. After that hearing, the ALJ concluded in May 1986 that CIG's guaranteed recovery of substantial fixed costs through its minimum bill was not "just and reasonable" and accordingly ordered the elimination of that minimum bill retroactive to September 28, 1985. *Colorado Interstate Gas Co.*, 35 F.E.R.C. ¶ 63,043, at 65,153-65,155 (1986).

b. In November 1987, the Commission affirmed the ALJ's invalidation of CIG's minimum commodity bill. Pet. App. 29a-62a.[3] The Commission determined that Natural and FERC's trial staff, as the proponents of the elimination of CIG's minimum bill, had satisfied their burden of showing that bill's anticompetitiveness.[4] The Commission first pointed to

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[3] The Commission, however, agreed with CIG that the ALJ had erred in ordering the elimination of the minimum bill retroactive to September 1985. The Commission therefore ordered CIG to eliminate the bill from its rate schedules prospectively from November 18, 1987—the date of the Commission's decision. Pet. App. 61a; see *id.* at 78a-79a. As a result, CIG was able to retain approximately $30 million collected from Natural under the minimum bill during the pendency of the administrative proceedings. In a companion opinion to this case, the court of appeals rejected Natural's challenge to this aspect of the Commission's decision. *Natural Gas Pipeline Co.* v. *FERC*, 904 F.2d 1469 (10th Cir. 1990).

[4] The Commission made plain that it "agrees with CIG that the burden of proof with respect to its minimum bill rested on Natural and the [FERC] staff because CIG proposed no change to its minimum bill." Pet. App. 58a.

the testimony of Natural's witness that "alternate supply sources must be priced lower than CIG's commodity rate by at least the amount of the minimum commodity bill before the two purchases are equally attractive to Natural," *id.* at 59a, and then cited CIG's admission that "it is in a gas over supply situation," *ibid.* The Commission further concluded that CIG had failed to rebut this prima facie showing of anticompetitiveness and had not shown its need for a minimum bill guarantee of fixed cost recovery. *Id.* at 60a-61a. In particular, the Commission found that CIG had "shown no specific connection between its minimum bill and its take-or-pay obligation." *Id.* at 61a.

c. In April 1988, the Commission denied CIG's petition for rehearing. Pet. App. 63a-82a. The Commission rejected CIG's contention that it had improperly shifted the burden of proof to CIG, explaining that "the burden of persuasion was on the challenging parties," although there were circumstances, such as those presented here, "whereby a challenger would meet its burdens unless the minimum bill's proponent was able to justify its retention." *Id.* at 74a-75a. The Commission reiterated that in this case "the burden properly shifted to CIG in light of testimony that minimum bills are anticompetitive and CIG's admission that it is in a 'gas oversupply situation.'" *Id.* at 75a (footnotes omitted). And the Commission explained again that CIG had failed to justify retention of its minimum bill. *Id.* at 75a-79a.

3. The court of appeals affirmed. Pet. App. 1a-26a. The court of appeals upheld the Commission's allocation of the burden of proof and its finding that CIG had not adequately rebutted the initial showing of the minimum bill's anticompetitive effect. *Id.* at 7a-12a. Moreover, the court concluded that the rec-

ord adequately supported the Commisison's determination that CIG had not shown that its minimum bill was "specifically designed" to satisfy one or more of the traditional justifications for minimum bill guarantees. *Id.* at 12a-20a.[5] In particular, the court found that the Commission reasonably concluded that CIG had failed to produce record evidence demonstrating a "specific connection" between petitioner's minimum bill and its take-or-pay obligations. *Id.* at 18a.

ARGUMENT

1. CIG principally contends (Pet. 8-12) that the court of appeals improperly relied on a presumption of anticompetitiveness in upholding the Commission's decision. That contention rests on a mistaken reading of the court of appeals' opinion. The court correctly noted that the Commission takes the position that remaining fixed cost minimum bills—given prevailing market conditions—usually restrain competition and are thus presumptively unjust and unreasonable. Pet. App. 7a-8a (citing *Transcontinental Gas Pipe Line Corp.*, 40 F.E.R.C. ¶ 61,188, at 61,589-61,590 (1987)). Nonetheless, the court pointed out that "[i]n the proceeding below, at least ostensibly, FERC relied not so much on the established pre-

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[5] Those traditional justifications, as the court of appeals explained, include

> protecting the pipeline against the risk of not recovering the fixed costs in the commodity component[,] * * * protecting full requirements customers from bearing a disproportionate share of the fixed costs resulting from swings off the system by partial requirements customers[, a]nd * * * protecting customers from take-or-pay liabilities the pipeline might otherwise incur.

Pet. App. 6a n.4 (brackets in original).

sumption as on arguments made by [Natural]." Pet. App. 8a. And the court explicitly "agree[d]" with the Commission that record evidence demonstrating the anticompetitive effect of CIG's minimum bill on Natural's purchasing decisions rested on "sound theory." *Id.* at 9a. In these circumstances, the court of appeals scarcely relied on any presumption in upholding the Commission's decision.[6]

2. Even if the court of appeals had relied on a general presumption of anticompetitiveness, its decision—contrary to CIG's contention (Pet. 13-16) —would be consistent with governing case law. In *Texas Eastern Transmission Corp.* v. *FERC*, 893 F.2d 767 (5th Cir. 1990), the court of appeals noted that the Commission, in its Order No. 380 rulemaking, "expressly left open * * * the possibility that it would, in the future, apply presumptions to cases involving fixed cost minimum bills or even eliminate *all* minimum bills." 893 F.2d at 774. And the court concluded that "there is nothing to prevent the Commission from establishing a presumption against particular rate methods in conjunction with particular tariff provisions." *Ibid.* (citing *Kansas Gas & Elec. Co.* v. *FERC*, 758 F.2d 713 (D.C. Cir. 1985)).[7]

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[6] Indeed, the court of appeals' treatment of CIG's substantive contentions refutes its claim that the court reflexively applied a presumption. See Pet. App. 8a-12a. The court explicitly stated that, "[c]onsidering all of CIG's arguments, [it does] not find substantial evidence to rebut FERC's reasonable showing of the anticompetitiveness of minimum bills, including CIG's." *Id.* at 11a-12a.

[7] CIG suggests (Pet. 14) that the court of appeals erred in requiring a "specific connection" between a particular minimum bill and a pipeline's take-or-pay obligations. But reviewing courts repeatedly have reminded pipelines that they must demonstrate that a contested minimum bill is "specifi-

Moreover, the Fifth and D.C. Circuits—in upholding Commission orders eliminating fixed cost minimum commodity bills—have ratified FERC's authority to predict the probable anticompetitive effect of a particular minimum bill, and to shift the burden of proof to the pipeline to produce evidence that the minimum bill is justified. See *Panhandle Eastern Pipe Line Co.* v. *FERC*, 881 F.2d 1101, 1113-1114 (D.C. Cir. 1989); *Trunkline Gas Co.* v. *FERC*, 880 F.2d 546, 548-552 (D.C. Cir. 1989); *Tennessee Gas Pipeline Co.* v. *FERC*, 871 F.2d 1099, 1104 (D.C. Cir. 1989); *East Tennessee Natural Gas Co.* v. *FERC*, 863 F.2d 932, 938-939 (D.C. Cir. 1988); *Transwestern Pipeline Co.* v. *FERC*, 820 F.2d 733, 739-746 (5th Cir. 1987), cert. denied, 484 U.S. 1005 (1988).[8]

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cally designed to achieve [one of the stated remedial ends], but nothing more." *Panhandle Eastern Pipe Line Co.* v. *FERC*, 881 F.2d 1101, 1113 (D.C. Cir. 1989) (quoting *Mississippi River Transmission Corp.* v. *FERC*, 759 F.2d 945, 950 (D.C. Cir. 1985)).

[8] CIG mistakenly suggests (Pet. 13-16) that the court of appeals' decision may not be squared with *Transcontinental Gas Pipe Line Corp.* v. *FERC*, 907 F.2d 1211 (D.C. Cir. 1990). *Transcontinental* stands for the unexceptionable proposition in administrative law that a court will remand Commission minimum bill decisions that do not contain a "reasoned explanation" based on record evidence. Here, in contrast to the record before the court in *Transcontinental*, the Commission adequately explained that the pipeline failed to demonstrate a "direct link" between the minimum bill at issue and the pipeline's potential take-or-pay liabilities. See Pet. App. 61a, 77a & n.35. And the court below reached the same conclusion, describing CIG's citations to the record in this regard as "skimpy," "incomplete," and "misleading." *Id.* at 19a-20a.

3. Finally, CIG contends that the procedures used by both the Commission and the court of appeals to review its minimum bill were "fundamentally unfair." Pet. 8. The record belies that claim. As the Commission noted, CIG "was well aware that its minimum bill was in issue and submitted evidence on the issue." Pet. App. 60a; see *id.* at 75a. CIG also was aware of the Commission's declining tolerance of minimum bills and the Commission's view that minimum bills generally are anticompetitive, even if not presumptively so. See, *e.g.*, *Transwestern Pipeline Co.*, 36 F.E.R.C. ¶ 61,175, at 61,439 (1986) (the "probable consequence" of a minimum bill is to "adversely affect competition"), aff'd, 820 F.2d 733 (5th Cir. 1987). CIG thus is mistaken in suggesting that the Commission's reliance, if any, on a general presumption of anticompetitiveness was an unexpected development, imposing severe "hardship" on the pipeline's efforts to retain its minimum bill. Pet. 9; see, *e.g.*, *Wisconsin Gas Co.*, v. *FERC*, 770 F.2d 1144, 1159 (D.C. Cir. 1985) (elimination of pipeline minimum bills can be expected to "lower gas costs and spur competition among pipelines"), cert. denied, 476 U.S. 1114 (1986).

Moreover, there is no basis for CIG's claim (Pet. 8, 18) that it lacked a "meaningful" opportunity to demonstrate the need for guaranteed fixed cost recovery through a minimum bill. The record shows that CIG had ample opportunity to rebut the Commission's prima facie showing of the anticompetitive effect of its minimum bill. The difficulty here was CIG's failure to do so.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1991

☆ U. S. GOVERNMENT PRINTING OFFICE; 1991 282061 20410